Omnium de Traitement et de Valorisation SA v Hilmarton Ltd

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

TIMOTHY WALKER J

19, 20, 24 MAY 1999

Arbitration – Award – Enforcement – Foreign award – Arbitration proceedings abroad in relation to foreign contract which breached English public policy – Arbitral award making no finding of corrupt practice but countenancing breach of statutory regulation in place of performance – Whether arbitral award should be refused enforcement as contrary to English public policy.

The respondent, H, contracted with the applicant, O, to approach Algerian public servants to assist H's efforts to obtain a government contract in Algeria. It was known to the parties that this breached an Algerian statute which prohibited the intervention of middlemen in such negotiations. The contract was expressly governed by Swiss law and provided for arbitration in Switzerland. A dispute subsequently arose over the payment of fees by O to H. H took the dispute to arbitration. After adjudication on the issue by the Swiss Courts, the arbitrator held that there had been no corruption involved in H's approaches, merely breach of a statute designed to protect Algerian industry from foreign competition. It would not therefore be contrary to the public policy of Switzerland to uphold the contract and an award was made against O. An order was made in the High Court giving effect in England to the arbitral award. O applied for that order to be set aside.

Held – An arbitration award, made under a foreign proper and curial law, which had specifically found that there was no corrupt practice should be enforced in England even if English law would have arrived at a different result on the ground that the underlying contract breached public policy because its performance involved a breach of statutory regulation in the place of performance. Accordingly, a Swiss arbitral award which determined that there had been no attempt at bribery or corruption in Algeria but merely a breach of a statute aimed at protecting Algerian suppliers from foreign competition, and hence that the contract concerned was not unenforceable as contrary to Swiss public policy, would be enforced even though an English tribunal might have come to a different conclusion. The application would therefore be dismissed (see p 148 *d g* to p 149 *a c d f g j* to p 150 *a c d* and p 151 *b*, post). *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 1 All ER (Comm) 865 applied; *Soleimany v Soleimany* [1998] 3 WLR 811 distinguished.

Per curiam. When an application was made *ex parte* for leave to enforce an award in the same manner as a judgment the duty of disclosure was no different from that which applied on other occasions (see p 152 *e*, post).

Notes

For enforcement of foreign arbitral awards, see 2 *Halsbury's Laws* (4th edn reissue) paras 714–716.

Cases referred to in judgment

Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 485.

Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] 1 All ER 513, [1988] QB 448, [1988] 2 WLR 735.

Regazzoni v K C Sethia (1944) Ltd [1957] 3 All ER 286, [1958] AC 301, [1957] 3 WLR 752, HL.

Soleimany v Soleimany [1998] 3 WLR 811, CA.

Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission [1994] 1 Lloyd's Rep 45.

Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd [1999] 1 All ER (Comm) 865, CA; *affg* [1998] 4 All ER 570, [1998] 3 WLR 770.

Application

The applicant, Omnium de Traitment et de Valorisation SA (OTV), applied for an order setting aside the ex parte order granted by Tuckey J on 3 September 1998, giving effect to an International Chamber of Commerce arbitral award applying Swiss law in favour of the respondent, Hilmarton Ltd, and also for an order that the award be refused enforcement in England under s 103 of the Arbitration Act 1996 on the ground that the enforcement of the award would be contrary to English public policy. The application was heard and judgment was given in chambers. The case is reported by permission of Timothy Walker J. The facts are set out in the judgment.

Graham Dunning (instructed by *Herbert Smith*) for OTV.

James Collins (instructed by *Norton Rose*) for Hilmarton Ltd.

Cur adv vult

24 May 1999. The following judgment was delivered.

TIMOTHY WALKER J. The applicant, Omnium de Traitement et de Valorisation SA (OTV), applies to set aside the ex parte order of Tuckey J (as he then was) made on 3 September 1998, giving effect in England to an International Chamber of Commerce (ICC) award dated 10 April 1992 in favour of Hilmarton Ltd. OTV further seeks an order that the award be refused enforcement in England under s 103 of the Arbitration Act 1996. It is not in dispute that if the application fails, Tuckey J's order should be varied so as to substitute the usual wording 'leave to enforce the award in the same manner as a judgment', rather than the wording used in the order as made, drafted by Hilmarton's then solicitors.

It is OTV's principal case that the award should not be enforced in England because such enforcement would be contrary to public policy. That can of course only be English public policy. As Waller LJ said in *Soleimany v Soleimany* [1998] 3 WLR 811 at 824 '… enforcement here is governed by the public policy of the lex fori'. I must also have in mind the precise scope of the duty of the English court to enforce New York Convention awards. Under s 103 of the Arbitration Act 1996 (which is in identical terms to its predecessor s 5 of the Arbitration Act 1975) enforcement of a New York Convention award 'shall not be refused' except in certain limited cases, and enforcement 'may also be refused' if it would be contrary to public policy to enforce the award.

The public policy point invoked by OTV is that the agreement was unlawful in its place of performance. It is however in my judgment necessary for OTV to go further, and establish that this infects the award as well.

The first step is to evaluate the award itself—see the approach of the Court of Appeal in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 1 All ER (Comm) 865 at 888 per Mantell LJ with whom Sir David Hirst agreed. Under the agreement the subject of the arbitration, OTV appointed Hilmarton—

> 'to be the legal and tax consultant and deal with the administration and coordination of the different parties involved in the design and completion of the various stages of the Drainage Project for the town of Algiers'.

OTV was to pay Hilmarton fees, the condition for the payment of which was the awarding of the public contract to OTV by the city of Algiers. This condition was met. OTV only paid Hilmarton half the agreed fees.

Under the relevant arbitration clause, the parties unequivocally chose Swiss law as the proper law of the contract ('this agreement is wholly governed by the laws of Switzerland'), chose ICC arbitration, and chose the curial law of the Canton of Geneva, the seat of the arbitration. Hilmarton therefore brought ICC arbitration proceedings to recover the unpaid balance, some 2·5m French francs. The request for arbitration was filed on 25 April 1986, and it was not until 10 April 1992 that the award at issue in this case was published.

It is a lengthy document. The sole arbitrator went into all the matters raised with great care. Its length is partly accounted for by the setting out in the award of the litigation history, including appeals to the Court of Justice of Geneva and the Supreme Court of Switzerland, together with an account of the proceedings before the original sole arbitrator who had heard the oral evidence, but who resigned subsequent to the reversal of his decision by the Swiss courts. The new sole arbitrator directed himself, entirely correctly as a matter of Swiss law, that he was bound by the opinions expressed by the Court of Justice and the Supreme Court.

The only matters relevant for present purposes are the findings of the (second) sole arbitrator on OTV's contention that Hilmarton's claim should be dismissed because it was 'contrary to a mandatory law of the place of performance of the contract'. In summary, the arbitrator held as follows.

(1) The work performed by Hilmarton, with OTV's agreement, consisted of approaching public servants and Algerian government officials in order to obtain the public contract. Such activity 'wittingly' breached an Algerian statute which prohibits the intervention of a middleman in connection with any public contract or agreement within the ambit of foreign trade.

BUT (2) this activity did *not* involve any bribery or other similar corrupt activity. Thus

> 'No bribe was foreseen. It has not been established that the Claimant would have paid bribes, carried out "lobbyist" or "insider" acts intended to divert Public Servants or Ministers from their duties, or indulged in the trading of favours.'

It would of course be quite wrong for this court to entertain any attempt to go behind this explicit and vital finding of fact. Nor was one made.

(3) As a matter of Swiss law (the law chosen by the parties) the agreement, albeit that it breached Algerian law, was not unlawful 'from the point of view of Swiss law'. It was not *contra bonae mores*, in the absence of bribes and other

dubious activities or illicit practices. The Algerian statute in question constituted a prohibited measure of a protectionist nature, to ensure that Algeria maintains a state monopoly on foreign trade; thus ethically speaking, it could not take priority over the parties' freedom of contract.

Therefore it can be seen from the reasoning both of the arbitrator and the Swiss courts that Swiss law made its own evaluation of the foreign statute, and in the light of the finding of fact that no corrupt activity was involved, refused to admit any illegality or public policy defence to the claim. Indeed, the Court of Justice regarded it as 'absolutely shocking' that OTV, which had regularly paid the amounts due *until* the public contract was awarded, then refused to comply fully with its contractual obligations.

Thus the very point which OTV now puts forward as a reason for refusal of enforcement in England was (1) ruled upon on the face of the award, and (2) rejected by the application of the law chosen by the parties, (3) on the basis of a finding of fact that no corrupt practices were involved.

It may well be that an English arbitral tribunal, chosen by the parties, and applying English law as chosen by the parties, would have reached a different result. It may well be that such a tribunal would have dismissed Hilmarton's claim, applying the full rigour of the principle stated by Viscount Simonds in *Regazzoni v K C Sethia (1944) Ltd* [1957] 3 All ER 286 at 289, [1958] AC 301 at 317 thus:

> '… whether or not the proper law of the contract is English law, an English court will not enforce a contract, or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly state which violates the law of that state.'

I should add that in applying this principle it is immaterial whether the contract itself is governed by English or foreign law.

But I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced.

In *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 1 All ER (Comm) 865 Waller LJ in the Court of Appeal, when dealing with the *'Lemenda'* point (see *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 All ER 513, [1988] QB 448), made some observations which in my judgment are directly relevant and applicable to the present case. His reasoning on this point was that of all three members of the Court of Appeal. He said (at 878):

> 'It must also follow, as it seems to me, that an English court would take notice of the fact that different courts and different tribunals might have different views as to the enforceability of contracts for the purchase of personal influence depending on the proper law of the contracts and where they were to be performed. It would be for example legitimate for a foreign tribunal to take the view (indeed consistent with the English court's own view if I am right on the above implication), *that albeit performance was*

contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed.

It is in this context, in my view, that albeit the award is not isolated from the underlying contract, it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the arbitral tribunal. *It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.*' (My emphasis in both cases.)

The sentences which I have emphasised are just this case; I respectfully agree with them. Further, in the same case at first instance ([1998] 4 All ER 570 at 600G–J, [1998] 3 WLR 770 at 801H–802B) Colman J said:

'… if one assumes that in this case the consultancy agreement did not involve any corrupt practice, but merely the use of personal influence with Kuwait government officials and that had the contract been sued upon in Kuwait, it would have been unenforceable as contrary to Kuwaiti public policy, one must go on to ask whether, if the English courts were now to enforce this Swiss award, that would offend international comity. To this question, in my judgment, the answer must be No. This is not a case of direct enforcement of the underlying contract, but of enforcement of the award which is a valid award in accordance with the curial law—Swiss law—chosen by the parties and made by arbitrators having jurisdiction and in respect of a contract governed by Swiss law.'

Again that is just this case.

Mr Dunning in his opening on behalf of OTV said the *Westacre* case was not relevant because in that case the party resisting enforcement did not have the findings it needed on the face of the award, where in this case it does. This was of course the point on which the Court of Appeal disagreed in the *Westacre* case. But the relevant observations of Waller LJ I have just cited relate to an entirely different part of the case. In his reply however Mr Dunning said that Waller LJ's observations were not in point, because there is a distinction to be made between performance being illegal and performance being contrary to public policy. I entirely disagree. They are but two strands of the same principle. Further I note that in the *Westacre* case in the Court of Appeal not only did Waller LJ ([1999] 1 All ER (Comm) 865 at 876) not differentiate between performance being illegal by the law of Kuwait and performance being contrary to public policy in Kuwait, but he appeared to equate the two concepts (see also Colman J [1998] 4 All ER 570 at 601B–C, [1998] 3 WLR 770 at 802E–F where the same apparent equation is made).

Finally, OTV's reliance on *Soleimany v Soleimany* [1998] 3 WLR 811, where in a judgment delivered by Waller LJ just over a year before his *Westacre* judgment, the Court of Appeal declined to permit enforcement of an arbitral award, was in

my view misplaced. In that case it was apparent from the face of the award that the arbitrator was dealing with an illicit enterprise for smuggling carpets out of Iran. It was quite simply a smuggling contract. The case thus clearly fell into the category of cases where as a matter of public policy no award would be enforced by an English court, and the whole of the judgment of the Court of Appeal has to be read in that context. The element of corruption or illicit practice was present which, on the arbitrator's unchallengeable finding of fact in this case, was not present here.

In my judgment there are no public policy grounds on which the enforcement of this award could be refused. Thus the case never gets within s 103(3) of the Arbitration Act 1996. It would be artificial to go further and say that in any event on these facts I would have exercised my discretion in favour of the enforcement of this award.

The other two grounds put forward by Mr Dunning under s 103 seem to me to be entirely hopeless. As to the suggestion that OTV was 'otherwise unable to present [its] case' within s 103(2)(c), the thrust of this complaint is that the (second) arbitrator refused to hear oral evidence and only held a short hearing to take closing submissions from both sides. As is often the case with complaints of this kind, it is answered simply by a careful reading of the award itself. What happened was that the (first) arbitrator heard all the witnesses both sides wished to call on two separate days. He took notes of the evidence. After the second arbitrator was appointed 'neither of the parties requested supplemental evidence, nor have they alleged new facts in relation to the substance of the case'. Further, the arbitrator made two further findings that bear repeating in full:

> 'In the case in question the facts of the main issue have already been examined in detail by the first arbitrator, then by the Court of Justice of Geneva and the Swiss Supreme Court. Before the undersigned arbitrator, the parties waived their right to submit new evidence. The procedure on the main issue is therefore so advanced that from the point of view of procedural economy and the efficiency rule that characterises the arbitration process, postponement of the decision on the merits to a later stage cannot be justified … In a procedural order of 28 October 1991, the arbitrator considered that he had sufficient knowledge of the decisive facts and rejected the defendant's request for the rehearing of the whole matter. The parties having not required the taking of new evidence, it therefore clearly appeared that, because of the nature of the issues to be determined as they resulted from the parties' written pleadings and exhibits and minutes filed in this matter, starting the hearing of the case afresh would have been a pointless measure and contrary to the arbitrator's duty to proceed with diligence and to settle disputes referred to him.'

I entirely agree. For good measure, the arbitrator added at the end of the passage I have just quoted 'This procedural decision issued by the arbitrator has not moreover been challenged by the parties'. There is thus nothing in the suggestion that OTV was unable to present its case.

As to the contention that the arbitral procedure was not in accordance with the agreement between the parties within s 103 (2)(e), this is a complaint that the ICC Rules were not complied with. The quality of the points made can be judged by the fact that the first one taken in Mr Dunning's written skeleton argument was that there should have been a second request for arbitration, when of course there already was such a request in existence in relation to the original

arbitration. Complaint is also made that no new terms of reference were produced; in this context Mr Dunning makes the strange submission that the ICC court was in breach of its own rules, in that it failed to chase up OTV after OTV had itself refused to sign the new draft terms of reference. What actually happened was that in the light of this refusal by OTV to sign the new terms of reference (as to the absence of which OTV now seeks to complain), the court of arbitration simply took note of the original terms of reference as countersigned by the (new) arbitrator. The new arbitrator said in the award on this point 'One does not see why such a procedure would be irregular'. Nor do I.

In fact, all these procedural points were taken before the arbitrator and failed. (See pages 14–31, concluding with the paragraph stating: 'Consequently the defendants' arguments intended to prove the arbitrator's lack of jurisdiction are groundless. The sole Arbitrator has been validly appointed in accordance with all relevant legal and regulatory provisions.')

Finally, Mr Dunning asserts non-disclosure by Hilmarton in obtaining the original *ex parte* order from Tuckey J. The thrust of the complaint here is that the affidavit did not specifically bring to the attention of the court the finding in the award that this was a contract which the arbitrator had held was illegal in the place of performance. It is of course basic principle that it is insufficient, if there is a point which should be drawn to the judge's attention, simply to leave it buried in an exhibit (see for example *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485 at 491 per Waller J as he then was, and *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45 at 62 per Potter J as he then was).

I do not accept Hilmarton's contention that when an application is being made ex parte for leave to enforce an award in the same manner as a judgment, the duty of disclosure is somehow different, because (it is said) the order does not take effect until the defendant has had an opportunity to set it aside. The effect of the granting of the order is still to leave the defendant worse off, because it then has an order against it. However, the short answer to the non-disclosure point here seems to me to be that even if the finding as to illegality by the place of performance had been elevated into prime position in the affidavit, it would not have made the slightest difference to the order Tuckey J made.

In the result the arbitration application fails on all points and is dismissed.

Order accordingly.

Rania Constantinides Barrister.